NO. 84982-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny the petition for review.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Weaver, No. 57691-7-I, filed June 1, 2010 (unpublished).

C. STATEMENT OF THE CASE

1. THE TRIAL AND SENTENCING

In December of 2002, defendant Oliver "Skip" Weaver raped 13-year-old R.T. RP 172-80. R.T., fearful of Weaver, did not report the rape until she discovered that she was pregnant. RP 128, 185-87. She aborted the fetus, and DNA testing confirmed that Weaver was the father. RP 93-94, 130-31, 189, 277-84.

The State charged Weaver with one count of second-degree rape of a child and one count of second-degree rape by forcible compulsion. CP 41-42. The State further gave notice that it would seek an exceptional sentence based upon the aggravating circumstance that the offense resulted in the pregnancy of a child victim of rape. CP 180-81. In February of 2005, a jury found

Weaver guilty on both counts and found the aggravating circumstance. CP 38-40.

Prior to sentencing, the trial court ordered the Department of Corrections to prepare a presentence investigation report. CP 196. A Community Corrections Officer ("CCO") subsequently prepared a report dated March 24, 2005. CP 193-95. In the report, the CCO indicated that he attempted to interview Weaver on March 23, 2005, but that Weaver's attorney had instructed Weaver not to participate in the interview unless his attorney was there. CP 194. Attached to the report was Appendix B, listing Weaver's criminal history. CP 195. The appendix identified two felony convictions: a 1981 second-degree burglary conviction and a 1985 second-degree burglary conviction. Id. The appendix also listed five misdemeanor convictions dated 1978, 1987, 1988, 1993, and 1996. Id. The report indicates the original was sent to the court and copies to the "PA" (Prosecuting Attorney) and David Gehrke (Weaver's attorney). CP 194.

The State also provided the court with a presentence report listing Weaver's criminal history. RP 371-72; CP 182-91. The State submitted the same Appendix B, which was attached to the DOC presentence report. CP 190.

At the sentencing hearing on April 8, 2005, Weaver's attorney responded to the information in the DOC presentence report. First, he explained why Weaver had refused to be interviewed by the CCO. RP 378:

> He was going to be interviewed by the Department of Corrections. I instructed him that if the individual showed up -- we tried to find out who it would be and when -- to ask them to reschedule so I could be there. I wasn't present when the individual showed up, but we did get a phone call in the office saying they only go once, that was it, and I would have to set a hearing and you would have to order them back, et cetera et cetera. And I decided that would not be an efficient use of everybody's time.

RP 378.

Weaver's attorney then acknowledged that Weaver had criminal history dating from his "younger days." RP 378-80.

At sentencing, the court calculated Weaver's offender score as two, based upon the two second-degree burglary convictions. CP 75, 81. The court imposed the maximum sentence of life and a minimum term exceptional sentence of 250 months. CP 74-78.

2. THE APPEAL

On appeal, Weaver claimed, among other issues, that the trial court erred by including his two burglary convictions in his

offender score, claiming that the State had failed to establish that they did not wash out. Brief of Appellant dated December 19, 2006, at 23-28. Weaver did not challenge the trial court's finding of the burglary convictions; instead, he argued that the State had failed to prove the existence of the misdemeanor convictions that prevented the felonies from washing out. Id.

In response, the State noted that the State's presentence report listed Weaver's criminal history, including the misdemeanor convictions. Brief of Respondent dated February 27, 2007, at 25-30. The State argued that because Weaver did not dispute his criminal history at the sentencing hearing, he had acknowledged his criminal history under RCW 9.94A.530(2). Id.

A few days before oral argument at the Court of Appeals, Division II issued its opinion in State v. Mendoza, 139 Wn. App. 693, 162 P.3d 439 (2007), aff'd, 165 Wn.2d 913, 925, 205 P.3d 113 (2009). In Mendoza, the court held that the term "presentence reports" referred to in RCW 9.94A.530(2) refers to "documents prepared by the Department of Corrections (DOC) at the trial court's request under RCW 9.94A.500." Id. at 702-03. The court rejected the argument that "the statement of prosecuting attorney"

submitted for sentencing qualified as a "presentence report." Id. at 707-08.

The State then moved to supplement the record with the DOC presentence report, which had not been filed in superior court. Motion to Supplement Record dated July 25, 2007. The State represented that the prosecutor assigned to this appeal had located a copy of the DOC presentence report in the State's file and had confirmed with the trial judge's bailiff that the court had received the report and had a copy in its file. Id. The State further represented that the prosecutor had communicated with Weaver's appellate counsel, who indicated that Weaver would not oppose the motion. Id. Indeed, Weaver did not oppose this motion to supplement the record.

On August 27, 2007, the Court of Appeals issued its published opinion, rejecting Weaver's challenge to his offender score and disagreeing with Division II's analysis in Mendoza. The court held that "the term 'presentence reports' in RCW 9.94A.530 includes criminal history information submitted by the State." State v. Weaver, 140 Wn. App. 349, 351, 166 P.3d 761 (2007), review granted in part and remanded, 166 Wn.2d 1014 (2009). The Court of Appeals declined to grant the State's motion to supplement the

record with the DOC presentence report, explaining that it was unnecessary given the resolution of the issue. Id. at 356 n.22.

Weaver petitioned for review. This Court granted review in Mendoza and deferred ruling on Weaver's petition. On April 16, 2009, the Supreme Court issued its opinion in Mendoza and affirmed Division II's opinion. The Court held that the prosecutor's statement of a defendant's criminal history was not a presentence report for the purposes of RCW 9.94A.530(2). State v. Mendoza, 165 Wn.2d 913, 925, 205 P.3d 113 (2009).

On July 8, 2009, this Court granted Weaver's petition "only on the offender score issue" and "remanded to the Court of Appeals, Division One, for reconsideration in light of State v. Mendoza, 165 Wn.2d 913." Order dated July 8, 2009.

The State renewed its motion to supplement the record with the DOC presentence report. Motion to Reconsider and Supplement the Record dated August 4, 2009. This time, Weaver opposed the motion. In the opposition, Weaver stated that he "cannot and does not agree that this report was presented to the trial court" and that he disputed its account of his criminal history. Response to State's Motion to Supplement Record and Reconsider dated August 26, 2009.

On September 9, 2009, the Court of Appeals granted the motion to supplement the record.

The Court of Appeals called for supplemental briefing, and Weaver attempted to raise a new issue: a claim that his two convictions violated double jeopardy. The State objected to Weaver raising this new issue.

On June 1, 2010, the Court of Appeals affirmed Weaver's sentence. The court held:

> The Department of Corrections criminal history report was before the court and was not objected to. Under *Mendoza,* therefore, Weaver acknowledged his offender score and cannot now object to it. Weaver seeks to advance a new argument, alleging a double jeopardy violation. We agree with the State that this argument must be raised in a personal restraint petition.

Opinion on Remand dated June 1, 2010 at 2.

Weaver petitioned for review. This Court has requested that the State file an answer and provide "an explanation of the circumstances surrounding the presentation of the department's special face sheet[1] to the trial court."

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[1] The Court's order refers to the "department's special facesheet." This is the title of the DOC presentence report. CP 193-95. Weaver has never claimed that this document was not a DOC presentence report and has referred to it as such in his briefing to the court. See Petition for Review at 7-8.

D. ARGUMENT

1. THE COURT SHOULD DENY REVIEW ON THE OFFENDER SCORE CALCULATION ISSUE.

In his petition, Weaver continues to challenge the calculation of his offender score. He argues that the record is insufficient to establish that the DOC presentence report was before the trial court at sentencing. He further emphasizes that he was silent at the sentencing hearing and claims that his attorney never expressly acknowledged his criminal history.

The fact that Weaver and his attorney did not expressly acknowledge his criminal convictions is not dispositive. A sentencing judge may rely on facts that are "admitted, acknowledged, or proved... at the time of sentencing." Former RCW 9.94A.530(2). "Acknowledgement includes not objecting to information included in the presentence reports." Id.; see also In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 873-74, 123 P.3d 456 (2005). In State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009), this Court held that the prosecuting attorney's statement of a defendant's criminal history did not qualify as a "presentence report" under former RCW 9.94A.530(2). Id. at 924-25. Instead, the Court observed that, "[w]hile 'presentence report' is not defined, it is frequently referred to in sentencing

statutes as a report completed by the Department of Corrections." Id. at 922.

Now that the DOC presentence report in this case is part of the record, Weaver contends the evidence is insufficient to show that this document, dated two weeks before the sentencing hearing, was before the trial court and the parties at the sentencing hearing. In fact, the second page of the report indicates that the original was provided to the court and that copies were sent to the prosecuting attorney and Weaver's attorney David Gehrke. CP 194. While the parties and the court did not expressly discuss this report on the record, Weaver's counsel responded to some of its content. In the report, the CCO wrote that Weaver had refused to be interviewed without his attorney present. CP 194. At the sentencing hearing, Weaver's attorney proceeded to explain why Weaver had not talked to the CCO. RP 378. Neither the court nor the prosecutor had raised the issue, and Weaver's attorney's statements make sense only if the parties and the court had the presentence report and were aware of Weaver's refusal to be interviewed.

When the State moved to supplement the record with this report, it represented that it had confirmed that the trial court had this presentence report. Motion to Supplement Record dated July 25, 2007. Weaver has never offered any evidence that this was not true. Accordingly, based upon this record, the Court of Appeals could properly conclude that Weaver and the trial court had the DOC presentence report.

Should this Court determine that review is warranted on this issue, the State requests that the Court summarily remand for re-sentencing. This direct appeal has now been pending for over five years. The State is prepared to prove Weaver's prior convictions. In the interest of finality and the efficient use of resources, it would be simpler to re-sentence Weaver rather undergo another year of the appellate process.

2. THE COURT OF APPEALS PROPERLY DECLINED TO CONSIDER WEAVER'S BELATED DOUBLE JEOPARDY CLAIM.

Weaver also seeks review of his belated claim that his convictions for second-degree rape of a child and second-degree rape violate double jeopardy. Weaver first raised this issue after the Court of Appeals issued its first opinion in this case and after

this Court remanded the case for reconsideration only on the offender score issue. The Court of Appeals acted within its discretion in refusing to consider this new claim given that it was untimely and outside the scope of this Court's remand. In his petition, Weaver offers no authority establishing that it was error for the Court of Appeals to refuse to allow him to assert a new assignment of error under these circumstances. The Court should deny review on this claim.

The State would note that Weaver's double jeopardy claim lacks merit. Double jeopardy is implicated only when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments are not authorized. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In order to determine whether multiple punishments are authorized, the court uses the "same evidence" test, which asks if the crimes are the same in law and in fact. Id. at 777-78. If each offense includes an element not included in the other, then the offenses are not the same in law under this test. Id. at 777.

Here, the two crimes, as charged, were not the same in law because each crime has an element not included in the other. The crime of second-degree rape, as charged, required evidence of forcible compulsion. CP 54. The crime of second-degree rape of a child required proof that the victim was 12 or 13 years old and the defendant was at least three years older than the victim. CP 52. Accordingly, the crimes are not the same in law.

In the primary case cited by Weaver in support of his double jeopardy claim, State v. Hughes, 166 Wn.2d 675, 212 P.3d 558 (2009), the second-degree rape conviction was based upon a different alternative means than charged in Weaver's case. In Hughes, the State did not allege forcible compulsion, but instead charged that the victim was unable to consent "by reason of being physical helpless or mental incapacitated." Id. at 682. The Supreme Court concluded that the convictions for second-degree rape and second-degree rape of a child were the same in law because "both statutes require proof of nonconsent because of the victim's status." Id. at 684. In Weaver's case, the element of forcible compulsion, not present in Hughes, has nothing to do with the victim's status.

E. CONCLUSION

For all the foregoing reasons, Weaver's petition for review should be denied.

DATED this 18th day of January, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the State's Answer, in STATE V. OLIVER WEAVER, Cause No. 84982-0, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

9-18-2011
Date

Done in Seattle, Washington